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Supreme Court of the United States

OCTOBER TERM, 1965

No. 637

JAHNCKE SERVICE, INC.
and
THE HOME INSURANCE COMPANY,
Petitioners

versus

THE GREATER NEW ORLEANS EXPRESSWAY COMMISSION
and
WINN-DIXIE LOUISIANA, INC.,
Respondents

PETITION FOR CERTIORARI TO THE COURT OF APPEALS FOR THE FIFTH CIRCUIT

Eberhard P. Deutsch,
Hibernia Bank Building,
New Orleans 70112,
Attorney for Petitioners

Deutsch, Kerrigan & Stiles,
René H. Himel, Jr.,
Cornelius G. Van Dalen,
William S. Stone,
Of Counsel

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PETITION FOR CERTIORARI TO THE COURT OF APPEALS FOR THE FIFTH CIRCUIT

Petitioners seek certiorari to review the judgment of the Court of Appeals for the Fifth Circuit in this case, and, in support of their petition, respectfully show:

Opinions Below and Jurisdiction

The opinion of the District Court is reported at 222 FS 521. The original opinion of the Court of Appeals is reported at 341 F2d 956. The qualifying opinion of the Court of Appeals on denial of rehearing has not been reported.

The judgment of the Court of Appeals is dated February 16, 1965, and was entered the same date. Rehearing was denied on July 6, 1965. Jurisdiction of this Court lies under 28 USC 1254(1).

Questions Presented

The following questions presented by this petition are of national importance to the uniformity and harmony of the maritime law, and to the marine transportation business generally:

1—Whether allowance of a direct action by a bridge-owner against the hull underwriter of a tug which collided with the bridge, under Louisiana's statute permitting direct actions against liability insurers, is violative of the federal Limitation of Liability Act.

2—Whether a small tug may be denied limitation of liability for property damage caused by her colliding with a causeway in inland waters, on the ground that she was unseaworthy for lack of a calibrated compass and a crew trained to adjust for compass error, when neither such compass nor such crew are required or customarily maintained aboard such vessels in such waters, and when the collision, occurring as it did at night in fog, must inevitably have taken place even if the tug's compass had been calibrated, or her crew trained to allow for compass error, when the pilot in charge persisted in proceeding in fog despite the tug-owner's standing rule against proceeding in fog.

As to the first question, the Fifth Circuit itself has made recent reference to the confusion resulting from recourse in maritime cases to "the Louisiana Direct Action Statute and the tenacity of persistent proctors who since 1954 have hoped longingly for the day in which the 4-1-4 riddle of the Jane Smith (Maryland Casualty Co. v. Cushing [347 US 409]) . . . could be authoritatively solved", and to "the likelihood that the Supreme Court does not itself know exactly what it meant to hold or now holds under Jane Smith". *Tokio Marine & Fire Ins. Co. vs Aetna Cas. & Surety Co.*, 322 F2d 113, 114, 115 (CA 5-1963).

As to the second question, the Fifth Circuit's decision herein is in apparent conflict with decisions of the Second Circuit in *Nuzzo vs Rederi A/S Wallenco*, 304 F2d 506 (CA 2-1962), and *Poignant vs United States*, 225 F2d 295 (CA 2-1955).

Statutes Involved

46 USC 183(a): The liability of the owner of any vessel, whether American or foreign, for any embezzlement, loss or destruction by any person of any property, goods, or merchandise shipped or put on board of such vessel, or for any loss, damage or injury by collision, or for any act, matter, or thing, loss, damage, or forfeiture, done, occasioned, or incurred, without the privity or knowledge of such owner or owners, shall not, except in the cases provided for in subsection (b) of this section, exceed the amount or value of the interest of such owner in such vessel, and her freight then pending. RS §4283; Acts of August 29, 1935, c. 804, §1, and June 5, 1936, c. 521, §1, 49 Stat. 960, 1479.

Louisiana Revised Statutes of 1950, Title 22:

Section 6. Insurance shall be classified and defined as follows:

* * *

(4) Liability. Insurance against the liability of the insured for the death, injury or disability of an employee or other person, and insurance against the liability of the insured for damage to or destruction of another person's property.

* * *

(13) Marine and transportation (inland marine).

* * *

(e) "Marine protection and indemnity insurance," meaning insurance against, or against legal liability of the insured for, loss, damage, or expense incident to ownership, operation, chartering, maintenance, use, repair or construction of any vessel, craft or instrumentality in use in ocean or inland waterways, including liability of the insured for personal injury, illness or death or for loss of or damage to the property of another person. 15 West's Louisiana Revised Statutes (1959) 74-76.

Section 611. The applicable provisions of this Part shall apply to insurances other than ocean marine and foreign trade insurances. This Part shall not apply to life or health and accident insurance policies not issued for delivery in this

state nor delivered in this state. 15A West's Louisiana Revised Statutes (1959) 15.

Section 655. No policy or contract of liability insurance shall be issued or delivered in this state, unless it contains provisions to the effect that the insolvency or bankruptcy of the insured shall not release the insurer from the payment of damages for injuries sustained or loss occasioned during the existence of the policy, and any judgment which may be rendered against the insured for which the insurer is liable which shall have become executory, shall be deemed prima facie evidence of the insolvency of the insured, and an action may thereafter be maintained within the terms and limits of the policy by the injured person, or his or her survivors mentioned in Revised Civil Code Article 2315, or heirs against the insurer. The injured person or his or her survivors or heirs hereinabove referred to, at their option, shall have a right of direct action against the insurer within the terms and limits of the policy; and such action may be brought against the insurer alone, or against both the insured and insurer jointly and in solido, in the parish in which the accident or injury occurred or in the parish in which an action could be brought against either the insured or the insurer under the general rules of venue prescribed by Art. 42, Code of Civil Procedure. This right of direct action shall exist whether the policy of insurance sued upon was written or delivered in the State of Louisiana or not and whether or not such policy contains a provision forbidding such direct action, provided the accident or injury occurred within the State of Louisiana. Nothing contained in this Section shall be construed to

affect the provisions of the policy or contract if the same are not in violation of the laws of this State. It is the intent of this Section that any action brought hereunder shall be subject to all of the lawful conditions of the policy or contract and the defenses which could be urged by the insurer to a direct action brought by the insured, provided the terms and conditions of such policy or contract are not in violation of the laws of this State.

It is also the intent of this Section that all liability policies within their terms and limits are executed for the benefit of all injured persons, his or her survivors or heirs, to whom the insured is liable; and that it is the purpose of all liability policies to give protection and coverage to all assureds, whether they are named insured or additional insureds under the omnibus clause, for any legal liability said insured may have as or for a tortfeasor within the terms and limits of said policy. 15A West's Louisiana Revised Statutes (1964 Cumulative Annual Pocket Part) 8-9.

Statement of the Case

Petitioner Jahncke's small tug *Claribel* was navigating in Lake Pontchartrain (adjoining New Orleans) during the night of January 26-27, 1960, when she collided with The Greater New Orleans Expressway, a 24-mile causeway which spans the Lake between its north and south shores. The causeway, and a truck traversing it, were damaged. R 642 *ff.*

In the words of the Court of Appeals (Appendix, pp. 17-18): "The evidence shows that the *Claribel*, pushing a big empty barge, headed north into Lake Pontchartrain from the Industrial Canal at New Orleans about midnight, January 27. Its written orders were to pick up two loads of reef at a dredge on the north shore of the lake and bring them back to one of Jahncke's slips, 'weather permitting'. To reach the dredge, the *Claribel* had to pass through the north drawbridge of the causeway, a twenty-four mile concrete bridge running north-south across the center of Lake Pontchartrain. Accordingly, Captain Carver, the ship's master, set out at about seven miles an hour on a compass course of 355 degrees. The afternoon weather report had been favorable. There was a haze over the lake, but no fog. As the tug and its tow left the canal, Captain Carver was relieved at the wheel by the pilot, Brister. Carver's parting instructions were that Brister should call him to help drop anchor if fog should come up.

"Brister maintained course and speed. The weather stayed the same until about 1:10 a.m., when pea-soup fog rolled in. Despite instructions, Brister turned his searchlight into the fog, reduced speed to about four miles an hour, then turned the light off and 'was looking around to see what I could see'. Apparently he could not see the causeway; five minutes later he ran into it."

Tugs can pass through the causeway at only the south span and the north span. R 501, 378. For passage, causeway traffic must be suspended, and the draw-span raised. For the *Claribel* to have passed through the north span as

planned, it would have been necessary for her to arrive at a point near the span, signal for the draw-span to be raised, and await the raising before proceeding through.

It is thus obvious that, proceeding blind in fog, the *Claribel* must necessarily have struck the 24-mile causeway regardless of the accuracy or inaccuracy of her compass, or the ability or inability of her pilot to compensate for error in reading the compass.

Such a tug is not required to carry a compass at all while navigating inland waters (46 CFR Subchapter C, Part 24, Sec. 24.01 *et seq.*), and many are not so equipped. R 392-93. It is neither customary nor required for the crew of such a tug, so navigating, to be trained to compensate for compass error. See footnote 2 below.

The Courts below held that the fact that the *Claribel's* compass was not calibrated,[1] and that her crew were not trained to compensate for compass error,[2] constituted unseaworthiness which was at least a contributing cause of the collision. The Courts held further that these matters,

[1] Calibration consists of determining, recording and rectifying, as far as possible, the "deviation" present in any magnetic compass. "Deviation" is the difference (in number of degrees east or west) between magnetic north and the point toward which, because of magnetic influences within the vessel itself, the 0° or "North" mark of the compass card of a particular vessel points. Bowditch, *American Practical Navigator* (US Hydrographic Office Publication No. 9), section 711.

[2] "Compass error" is the combination of deviation (see footnote 1 above) and variation (the difference between true north and magnetic north at a given point on the earth's surface). It is a term of art which does not connote any deficiency in the compass (since every magnetic compass is affected by known variations and by some degree of deviation), but merely indicates the required compensation to convert a compass course or bearing into a true course or bearing. Bowditch, *supra, loc. cit.*

since the tug-owner's managerial personnel were aware of them, were within the "privity and knowledge" of the owner; and the owner was accordingly denied limitation (to the value of the tug) of liability for the damage to the causeway and to the truck traversing it at the time of the accident. 222 FS at 523-25, 527; 341 F2d at 958-60; Appendix, pp. 19-22, 30-34.

The tug had hull insurance containing the usual "running down" clause, under which the underwriter agreed to indemnify the tug-owner against any sums which it might have to pay for damage to property caused by collision. Exhibit Jahncke-1; R 356. The owners of the causeway and of the damaged truck filed direct actions against the tug's hull underwriter, asserting that the running-down clause of the hull policy constituted a policy of liability insurance subject to Louisiana's direct-action statute (RS 22:655, p. 5 above).

Respondents' right to maintain these direct actions, which were tried along with the tug-owner's proceeding for limitation of liability, was sustained by the District Court and by the Court of Appeals. 222 FS at 526; 341 F2d at 960-61; Appendix, pp. 22-23, 36-37. However, on denying a rehearing, the Court of Appeals rendered a curious *per-curiam* opinion which, while not dismissing the direct actions, held that the underwriter was liable for interest only "from the date of payment by its assured", as under an indemnity, rather than a liability, policy, citing its own decision in *Stuyvesant Ins. Co. vs Nardelli*, 286 F2d 660 (1961). Appendix, p. 25.

Reasons for Allowance of Certiorari

Question 1

In *Maryland Casualty Co. vs Cushing*, 347 US 409 (1954), this Court considered the question whether Louisiana's direct-action statute permissibly breaches the nationwide uniformity of maritime law, and especially the federal Limitation of Liability Act, by authorizing direct actions by injured parties against the tortfeasor's marine Protective and Indemnity (liability) underwriter.

This Court was unable to reach a decision on the question, four Justices holding that the State statute could not constitutionally be so applied, four asserting that it could, and one Justice feeling that some restricted application of the statute, hedged about to assure non-infringement of the shipowner's rights under the supreme federal Act, might be permissible.

To break the deadlock, this Court ordered the direct actions continued until after completion of the ship-owner's proceeding for limitation of liability. 347 US at 423. Judgment adverse to the shipowner was rendered in the limitation proceeding, and reversed on appeal (*Oil Transport Co. vs Verrett*, 278 F2d 464), and this Court again granted certiorari. 364 US 878. At this juncture, however, the entire case was disposed of by settlement (see 365 US 768), and definitive clarification of the questions at issue was again frustrated.

This Court now again has the opportunity to consider and determine the applicability of the Louisiana statute to marine policies—this time a hull policy containing a running-down clause[3]—within the framework of the Federal Limited Liability Act.

The need for definitive determination is emphasized by the uncertainties resulting from the apparent non-application of the State statute to marine policies under its own express terms,[4] and from the fact that a partly different panel of the Fifth Circuit had itself previously determined that marine running-down coverage, as involved in this case, is indemnity rather than liability insurance, the underwriter's liability under which arises only after its

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[3] Unlike marine Protective and Indemnity insurance, the running-down clause of a hull policy indemnifies the ship-owner only against property damage caused by the ship, not against liability for death or personal injury. See Exhibit Jahncke-1 (R 356), lines 144-46.

[4] La. RS 12:655 (p. 5 above) applies, by its terms, to policies of "liability insurance". The Louisiana Insurance Code, as it read when *Cushing* was decided and as re-enacted since, in which Section 655 is contained, distinguishes between "liability insurance" on the one hand, and marine insurance on the other. RS 12:6(4) and (13)(e), p. 4 above. And RS 12:611, introductory to the Part of the Code containing Section 655, expressly provides that "the applicable provisions of this Part shall apply to insurances other than ocean marine". P. 4 above. [The record in this case confirms the fact that "contrary to the opinion of most laymen, insurance on ships and cargoes on inland lakes and rivers is not Inland Marine insurance at all, but *Ocean Marine* business", National Underwriter Service, FC&S Bulletin, Inland Marine, A-e-1, April 1939. R 361,373.] See opinion of Judge Wright in *Cushing vs Maryland Casualty Co.*, 99 FS 661 (ED La.-1951), rev'd, 198 F2d 536 (CA 5), vacated, 347 US 409. In the only reported decision of a Louisiana state court involving a direct action on a marine policy, the court adopted this Court's approach of continuing the direct action pending completion of the limitation proceeding. *Reid vs Cruse Brothers*, 134 So.2d 917 (La. App.-1961).

assured has actually paid a claim against it. *Stuyvesant Ins. Co. vs Nardelli*, 286 F2d 600 (CA 5-1961).[5]

When the *Stuyvesant* holding was emphasized to it by petition for rehearing in this case, this panel of the Fifth Circuit compounded confusion by issuing a puzzling *per curiam* which seems to give partial recognition to the *Stuyvesant* rule by holding that the marine running-down underwriter is liable for interest only "from the date of payment by its assured"—indicating that the underwriter's liability arises only at that time, and that the direct actions were thus premature—but the Court failed to dismiss the direct actions. Appendix, p. 25.

Question 2

The Courts below not only held the tug-owner to be liable for the damages at issue (as it concededly was, because of its pilot's fault in proceeding blind in fog), but went further and denied the tug-owner the right, accorded to it by the Limitation of Liability Act, to limit its liability to the value of the tug.

The denial of limited liability was based on a finding of proximately causal unseaworthiness within the owner's privity and knowledge, because the tug's compass was not

[5] A third, partly-different panel of the Fifth Circuit had recent occasion to deplore the confusion resulting from "the Louisiana Direct Action Statute and the tenacity of persistent proctors who since 1954 have hoped longingly for the day in which the 4-1-4 riddle of the Jane Smith (Maryland Casualty Co. v. Cushing) . . . could be authoritatively solved", as well as "the likelihood that the Supreme Court does not itself know exactly what it meant to hold or now holds under Jane Smith". *Tokio Marine & Fire Ins. Co. vs Aetna Cas. & Surety Co.*, 322 F2d 113, 114, 115 (CA 5-1963).

calibrated, and because her pilot was not trained to compensate for compass error.

Since it is clear that neither a calibrated compass nor personnel trained to compensate for compass error are either required or customary for small vessels in inland waters,[6] this holding by the Court of Appeals for the Fifth Circuit conflicts with the settled rule in the Second Circuit that seaworthiness entails compliance only with "the usual and customary standards of the calling", the question being only "whether the vessel had been provided with the equipment usually found in other vessels". *Nuzzo vs Rederi A/S Wallenco*, 304 F2d 506, 510 (CA 2-1962); *Poignant vs United States*, 225 F2d 595, 598 (CA 2-1955). And see *The Authentic*, 90 F2d 437 (CA 2-1937); *The Transfer No. 21*, 248 Fed. 459 (CA 2-1917). Accord: *Boston Marine Ins. Co. vs Metropolitan Redwood Lumber Co.*, 197 Fed. 703 (CA 9-1912).

The Fifth Circuit's contrary position itself seems to be becoming settled. See *Walker vs Harris*, 335 F2d 185 (CA 5-1964), cert. den., 379 US 930; *Edmundson vs Hebert*, 329 F2d 627 (CA 5-1964).

Many owners of small vessels operate across Circuit boundaries in the inland waterway system. Since they

[6] R 332-35, 343-45, 428-29. Small tugs of this class are exempted, Congressionally and administratively, from the compass and trained-pilot requirements applicable to larger vessels. 46 CFR Subch. C., Part 24, Sec. 24.01 *et seq.* 46 CFR 184.30-1, relating to compasses on inspected vessels, does not even require a compass if the vessel is operated "in river service" or "in protected waters with short restricted routes". These exemptions were a deliberate expression of national policy. Senate Report 1321, 74th Cong., 1st Sess. (1935); *Kelly vs Washington*, 302 US 1, 7 (1937).

ordinarily maintain protective insurance only up to the value of their vessels, it is of substantial importance to them to know with certainty to what precise and technical standards of seaworthiness they will be held.

The present conflicting positions of the Courts of Appeals for the Second and Fifth Circuits on this issue make such certainty unattainable, unless and until this Court acts to resolve the divergent approaches, and to restore uniformity to this field of maritime law.

Conclusion

The questions presented by this petition call for authoritative clarification and settlement by this Court of the vexed questions at issue—disruptive of the inter-Circuit harmony as to questions of maritime law, essential to the continued orderly conduct and development of the marine commerce of the nation.

For the foregoing reasons, it is respectfully submitted that certiorari should be granted.

Eberhard P. Deutsch,
Attorney for Petitioners

Deutsch, Kerrigan & Stiles,
René H. Himel, Jr.,
Cornelius G. Van Dalen,
William S. Stone,
Of Counsel

October, 1965

ORIGINAL OPINION OF THE COURT OF APPEALS

Before RIVES and WISDOM, Circuit Judges, and MORGAN, District Judge.

WISDOM, Circuit Judge: These appeals present three questions: (1) may petitioner Jahncke limit liability under 46 U.S.C. § 183; (2) is a direct action available against Jahncke's insurer, Home Insurance; (3) is the claim of appellant Coleman barred by laches. Lurking in the fog is *Maryland Casualty Co. v. Cushing*,[1] a grisly spectre of undefined size and shape. Putting our trust in the trial judge's compass wherever the visibility is poor, we affirm the judgment of the district court.

Early on the morning of January 27, 1960, in heavy fog, a barge in tow of Jahncke's tug Claribel hit a support piling of the Lake Pontchartrain Causeway, 3.4 miles south of the north draw. Two spans of the causeway collapsed. A Winn-Dixie trailer-truck, which happened to be crossing the causeway at the point of impact, was damaged and lost some of its freight. The Greater New Orleans Expressway Commission, owner and operator of the causeway, filed a libel in rem aaginst the Claribel, and a libel in personam against Jahncke. The Commission joined Home Insurance as a defendant under the Louisiana direct action statute.[2] Winn-Dixie also brought a direct action against Home Insurance. February 3, 1960, Jahncke filed a petition seeking exoneration or,

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1 347 U. S. 409, 74 S. Ct. 608, 98 L. Ed. 806 (1954).
2 La. Rev. Stat. 22:655.

alternatively, limitation of liability.[3] Jahncke later withdrew its claim for exoneration, maintaining only the petition for limitation. The limitation proceeding was consolidated for trial with the direct actions. On the day of the trial, Bradford Coleman, the driver of the Winn-Dixie truck, tried to assert a claim against Jahncke for alleged traumatic neurosis. The district court, in a written opinion, (1) denied Jahncke the right to limitation, (2) entered an interlocutory decree holding Jahncke and Home Insurance liable to Winn-Dixie, and (3) dismissed Coleman's claim as barred by prescription and laches. 222 F. Supp. 521.

I.

The Limitation Act is a seagoing qualification of the doctrine of respondeat superior. Under 46 U.S.C. § 183, the liability of the owner of a vessel "for any loss, damage or injury by collision . . . incurred without the privity or knowledge" of the owner shall not exceed the value of the owner's interest in the vessel and its freight. If the owner is chargeable with privity or knowledge, he may not limit.[4] Where, as here, the owner is a corporation, privity or knowledge attributable to management

[3] 46 U.S.C. § 183:

"(a) The liability of the owner of any vessel, whether American or foreign, for any embezzlement, loss, or destruction by any person of any property, goods, or merchandise shipped or put on board of such vessel, or for any loss, damage, or injury by collision, or for any act, matter, or thing, loss, damage, or forfeiture, done occasioned, or incurred without the privity or knowledge of such owner or owners, shall not, except in the cases provided for in subsection (b) of this section, exceed the amount or value of the interest of such owner in such vessel, and her freight then pending."

[4] Avera v. Florida Towing Corporation, 5 Cir. 1963, 322 F.2d 155, 166; States Steamship Company v. United States, 9 Cir. 1958, 259 F.2d 458, 466, cert. den'd, 358 U. S. 933, 79 S. Ct. 316, 3 L. Ed.2d 305; The Cleveco, 6 Cir. 1946, 154 F.2d 605, 613.

(or those to whom the authority of management has been delegated) binds the corporation.[5] The petitioner in limitation, as the prime mover and the party best able to do so, bears the burden of proving lack of privity or knowledge.[6] But the burden of proving negligence stays with the libellants.[7]

The district court found the Claribel unseaworthy in having neither a properly calibrated compass nor a crew competent to use one. The court charged the Claribel's unseaworthiness to Jahncke, and held that it was a proximate cause of the collision. Jahncke insists that the sole proximate cause was the failure of the Claribel's pilot, one D. C. Brister, to follow standing company instructions to drop anchor in heavy fog.

The evidence shows that the Claribel, pushing a big empty barge, headed north into Lake Pontchartrain from the Industrial Canal at New Orleans about midnight, January 27. Its written orders were to pick up two loads of reef at a dredge on the north shore of the lake and

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[5] The Linseed King, 1931, 285 U. S. 502, 509-10, 52 S. Ct. 450, 76 L. Ed. 903; Austerberry v. United States, 6 Cir. 1948, 169 F.2d 583, 594; Great Atlantic & Pacific Tea Co. v. Brasiliero, 2 Cir. 1947, 159 F.2d 661, 664 (and cases cited in n. 3) cert. den'd 331 U. S. 836, 67 S. Ct. 1519, 91 L. ed. 1859; The Cleveco, supra; The Marguerite, 7 Cir. 1944, 140 F.2d 491, 493; In re Petition of Henry Du Bois' Sons Co., S.D.N.Y. 1960, 189 F.Supp. 400, 401-3.

[6] Coryell v. Phipps, 1943, 317 U. S. 406, 409, 63 S. Ct. 291, 87 L. Ed. 363; States Steamship Company v. United States, 9 Cir. 1958, 259 F.2d 458, 464, 466, 474; Austerberry v. United States, supra, The E. Madison Hall, 4 Cir. 1944, 140 F.2d 589, 591, cert. den'd; W. E. Valiant Co. v. Rayonier, Inc., 322 U. S. 748, 64 S. Ct. 1159, 88 L. Ed. 1579; The Marguerite, supra, at 492; The Silver Palm, 9 Cir. 1937, 94 F.2d 776, 777; In re Petition of Henry Du Bois' Sons Co., supra, at 401; Navigacion Castro Riva v. The M. S. Nordholm, E.D.La. 1959, 178 F. Supp. 736, 741, aff'd, 287 F.2d 398; In re Eastern Transportation Co., D.C.Md 1929, 37 F.2d 355, 358, modified, The Calvert, 4 Cir. 1931, 51 F.2d 494.

[7] See Gilmore and Black, Admiralty, p. 705, n. 3.

bring them back to one of Jahncke's slips, "weather permitting". To reach the dredge, the Claribel had to pass through the north drawbridge of the causeway, a twenty-four mile concrete bridge running north-south across the center of Lake Pontchartrain. Accordingly, Captain Carver, the ship's master, set out at about seven miles an hour on a compass course of 355 degrees. The afternoon weather report had been favorable. There was a haze over the lake, but no fog. As the tug and its tow left the canal, Captain Carver was relieved at the wheel by the pilot, Brister. Carver's parting instructions were that Brister should call him to help drop anchor if fog should come up.

Brister maintained course and speed. The weather stayed the same until about 1:10 a.m., when pea-soup fog rolled in. Despite instructions, Brister turned his searchlight into the fog, reduced speed to about four miles an hour, then turned the light off and "was looking around to see what I could see". Apparently he could not see the causeway; five minutes later he ran into it.

Testimony focused on the accuracy of the Claribel's compass. It appears that the compass had not been checked or calibrated since it was installed in 1956. Electric arc welding, which affects the compass of a steel-hulled vessel, had been used on the Claribel shortly before the accident. In addition, several witnesses testified that the size, position, and number of barges in tow of a tug influence the behavior of its compass. Neither the captain nor the pilot of the Claribel had the slightest understanding of the workings of a compass, or how to compensate for the factors that affect its performance.

Jahncke urges that, despite the inaccuracy of the Claribel's compass and the incapacity of its crew, the fact remains that 355 degrees had been shown, over the course of innumerable trips between the Industrial Canal and the north drawbridge, to be the proper setting *for that particular compass on that particular haul.* Jahncke argues that by starting from the heading of 342 1/2 degrees (the true course between the Industrial Canal and the north draw); subtracting six degrees (the easterly magnetic "variation" at Lake Pontchartrain); adding seventeen degrees (the westerly "deviation" of the Claribel's compass); and throwing in 1 1/2 degrees for westerly "drift"; we are driven ineluctably to Claribel's proper compass course of 355 degrees. Petitioner's mathematics are beyond reproach. But they are in no sense proof that the deviation of the Claribel's compass, at that particular time, despite arc welding and the tow, was in fact seventeen degrees. As for the 1 1/2 degrees of "drift", we have found no evidence of it in the record. Furthermore, the fact that on one of three test runs made by Jahncke after the accident the compass course used was 360 degrees (allegedly because of wind), and the fact that Captain Carver admitted that he now runs a course of 358 degrees, cast a long shadow of implausibility over petitioner's theory.

The evidence generously supports the district court's finding that shortcomings of crew and compass were a proximate cause of the accident, though not the sole proximate cause. The more difficult question, as we see it, is whether the standard of care on Lake Pontchartrain requires that a vessel such as the Claribel have an ac-

curate compass and a crew that knows how to use it; or, more properly, whether such a vessel without these accouterments is unseaworthy. Petitioner points out that the Coast Guard does not require tugboat masters on the lake to be licensed navigators. The record indicates that masters who understand even the rudiments of compass compensation are the exception rather than the rule. The evidence justifies, indeed requires, an inference that practices regarding compass repair and calibration are casual on those waters, possibly because most navigation on Lake Pontchartrain is done by dead reckoning, when visibility is good. But the evidence also establishes that visibility is often not good. Lake Pontchartrain is large and shallow, subject to sudden weather changes, treacherous squalls, and frequent fog. Commercial traffic is heavy, and the barges that ply the lake are big and unwieldy. Petitioner's own compass expert, Mr. Irwin Williams, testified that anyone who navigates on Lake Pontchartrain should have a "proper compass" and should understand how to use it. Libellants' expert, Captain E. R. Vorenkamp, said that, in his opinion, people operating tugs on the lake should have more or less the qualifications required of offshore navigators, and should certainly know how to check a compass for changes in deviation.[8] In light of this testimony, we cannot say that the district court's finding of unseaworthiness is unwarranted, despite the laxity of prevailing custom on Lake Pontchartrain. Usage is not, and should not be, an

[8] The master of the Claribel had an ideal opportunity to check the deviation on each haul, as Williams testified, because the tug, to get to the lake from its slip, had to pass through the Industrial Canal, of fixed and known direction.

inevitable standard. Judge Learned Hand put the proposition sharply:

> There are, no doubt, cases where courts seem to make the general practice of the calling the standard of proper diligence; we have indeed given some currency to the notion ourselves. [citations omitted.] Indeed in most cases reasonable prudence is in fact common prudence; but strictly it is never its measure; a whole calling may have unduly lagged in the adoption of new and available devices. It never may set its own tests, however persuasive be its usages. Courts must in the end say what is required; there are precautions so imperative that even their universal disregard will not excuse their omission. The T. J. Hooper, 2 Cir. 1932, 60 F.2d 737, 740, cert. den'd, *Eastern Transportation Company v. Northern Barge Corporation*, 287 U.S. 662, 53 S. Ct. 220, 77 L. Ed. 571.[9]

The unseaworthiness of the Claribel is attributable to Jahncke's marine superintendent, Nunez. Nunez was responsible for the maintenance of Jahncke's vessels and for the hiring and firing of marine personnel. The district court properly held that "a marine superintendent is a

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[9] See also Texas & Pacific Railway Co. v. Behymer, 1903, 189 U. S. 468, 470, 23 S. Ct. 622, 47 L. Ed. 905; Pure Oil Co. v. Snipes, 5 Cir. 1961, 293 F.2d 60, 71; Kane v. Branch Motor Express Co., 2 Cir. 1961, 290 F.2d 503, 507; June T., Inc. v. King, 5 Cir. 1961, 290 F.2d 404, 406; Schlichter v. Port Arthur Towing Company, 5 Cir. 1961, 288 F.2d 801, 804 (dictum); Santomarco v. United States, 2 Cir. 1960, 277 F.2d 255, 257, cert. den'd, American Stevedores v. United States, 364 U.S. 823, 81 S. Ct. 59, 5 L.Ed.2d 52; Troupe v. Chicago D. & G. Bay Transit Co., 2 Cir. 1956, 234 F.2d 253, 260; Prosser, Torts, 3rd ed. p. 170.

managing officer whose privity or knowledge is chargeable to the corporation". 222 F. Supp. at 525.[10]

II.

Home Insurance sets up two defenses to the direct actions. It argues first that direct action is precluded where limitation is at issue; second it asserts that the policy issued to Jahncke is excluded by statute from the application of the Louisiana Insurance Code, and hence from direct action.

The question of whether direct action may coexist with limitation is one on which the Supreme Court ran aground in *Maryland Casualty Company v. Cushing*, 1954, 347 U.S. 409, 74 S. Ct. 608, 98 L. Ed. 806. The Court was of three minds: four Justices[11] thought direct action repugnant to the policies of the Limitation Act, and not to be allowed at all where limitation is at issue. To another four,[12] the two proceedings were in no way incompatible. And the remaining member[13] of the Court thought that the direct action should simply be stayed until conclusion of the limitation proceeding, so that the shipowner's insurance proceeds would not be exhausted before limitation. The first four acquiesced in this solution "to break the deadlock". "Because of the Court's extraordinary division, it is impossible to say what the Cushing case stands for, beyond the fact that it presumably established

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[10] See The Cleveco, supra; In re Petition of Henry Du Bois's Sons Co., supra; The Erie Lighter 108, D.C.N.J. 1918, 250 F. 490, 494; cf. New York & Cuba Mail S.S. Co. v. Continental Ins. Co., 2 Cir. 1941, 117 F.2d 404, 407-8, cert. den'd U. S. 580, 61 S.Ct. 1103, 85 L. Ed. 1537.

[11] Justice Frankfurter, with Justices Reed, Jackson, and Burton.

[12] Justice Black, with Chief Justice Warren, and Justices Douglas and Minton.

[13] Justice Clark.

a procedure to be followed by lower courts in handling similar cases until the Supreme Court further clarifies the issues."[14] Here, because the two proceedings were consolidated, the direct action was in effect stayed until the conclusion of the limitation proceeding. Denial of limitation renders the question retrospectively moot anyway. It also enables us to steer clear of the problem of whether, as a matter of Louisiana law, Home Insurance is entitled to the benefits of Jahncke's right to limit.

Cushing circumnavigated, we turn to the Louisiana statute. La. Rev. Stat. 22:611 provides that the Louisiana Insurance Code "shall apply to insurances other than ocean marine and foreign trade insurances." The district court, however, held that the policy issued to Jahncke, although a policy of hull insurance, was also a public liability policy, subject to the Code, and therefore to the direct action statute. The policy insured Jahncke against liability for personal injury or property damage caused by the Claribel. The direct action statute, by its terms, applies to every "policy or contract of liability insurance." Though historically no love has been lost, at least in diversity suits, between the direct action statute and the Fifth Circuit, we resist the temptation to manacle an old and now beaten enemy.[15] "There is no indication in Sec. 655 that the Louisiana legislature intended to deny the right of direct action to marine policies, while ex-

[14] Gilmore and Black, Admiralty p. 715; see Tokio Marine & Fire Insurance Company v. Aetna Casualty & Surety Company, 5 Cir. 1963, 322 F.2d 113.

[15] A 1964 amendment to 28 U.S.C. § 1332 provides that, for purposes of federal jurisdiction, an insurer defendant in a direct action (filed after August 14, 1964) is to be attributed with the State citizenship of its insured. The amendment will keep from the federal docket a raft of cases, jurisdiction over which would have been "conferred" on the federal courts by the Louisiana legislature.

tending it to others." *Cushing v. Maryland Cas. Co.*, 5 Cir. 1952, 198 F.2d 536, 538, *reh den'd* 198 F. 2d 1021, reversed on other grounds, *Maryland Casualty Company v. Cushing, supra.* See also *Lovless v. Employers' Liability Assurance Corporation*, 5 Cir. 1955, 218 F.2d 714.

III.

Finally, there is the appeal of Bradford Coleman, driver of the Winn-Dixie truck: April 7, 1960, the district court, having earlier enjoined all claims against Jahncke or Home Insurance Company except those timely filed in the consolidated proceeding, entered an order noting the default of all persons who had not filed claims in connection with the collision of January 27. February 7, 1962, the court relaxed its injunction to permit Coleman to file a direct action against Home Insurance. Coleman never filed the direct action, but on the first day of the trial, April 1, 1963, he moved for permission to assert his defaulted claim against Jahncke in the limitation proceeding. Attached to the motion was a letter from a psychiatrist, stating that Coleman was of "borderline intelligence", and had been mentally incompetent to assert his claim. The district court, without ruling on the motion, let Coleman participate in the trial. Coleman's lawyer argued his motion, but Coleman did not appear. The court, noting that tort actions in Louisiana prescribe in one year,[10] found that Coleman had not excused his delay, and that Jahncke had been "seriously prejudiced" by Coleman's laches. The court's holding that Coleman's claim is barred seems to us appropriate in fact and in law.

The judgment of the district court is AFFIRMED.

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[10] La. Civil Code, Arts. 3536 and 3537.

OPINION OF THE COURT OF APPEALS ON DENIAL OF REHEARING

Before RIVES and WISDOM, Circuit Judges, and MORGAN, District Judge.

PER CURIAM: The petition for rehearing and supporting brief filed by appellants Jahncke Service, Inc. and Home Insurance Company require that we qualify our original opinion affirming the judgment below. That judgment casts Jahncke Service, Inc. and Home Insurance Company "jointly, severally and *in solido*" for all damages plus interest. Home Insurance Company, however, is liable only to the limits of its policy, plus interest from the date of payment by its insured, Jahncke Service, Inc. *Stuyvesant Insurance Company of New York v. Nardelli*, 5 Cir. 1961, 286 F.2d 600, 605.

As to all other grounds the petitioners raise, the petition for rehearing is DENIED.

JUDGMENT OF THE COURT OF APPEALS

Before RIVES and WISDOM, Circuit Judges, and MORGAN, District Judge.

JUDGMENT

This cause came on to be heard on the transcript of the record from the United States District Court for the Eastern District of Louisiana, and was argued by counsel;

ON CONSIDERATION WHEREOF, it is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, affirmed;

It is further ordered and adjudged that the appellants, Jahncke Service, Inc. and The Home Insurance Company and others, be condemned, in solido, to pay the costs of this cause in this Court for which execution may be issued out of the said District Court.

February 16, 1965

Issued as Mandate:

OPINION OF THE DISTRICT COURT

AINSWORTH, District Judge: These cases involve a determination of a petition in admiralty by Jahncke Service, Inc. for exoneration from, or limitation of, liability and the direct actions for damages by The Greater New Orleans Expressway Commission against petitioner and its insurer, The Home Insurance Company, and by Winn-Dixie Louisiana, Inc. against petitioner's insurer and the Expressway Commission's insurer. The Expressway Commission and Winn-Dixie also filed similar claims in the limitation proceeding. On the day trial of these cases began, Bradford Coleman, driver of Winn-Dixie's truck, filed a claim in the limitation proceeding for damages for personal injuries. Motion to dismiss and for summary judgment was filed by The Home Insurance Company against this late-filed claim, and the court reserved its ruling and proceeded with the trial.

On January 25, 1960, in the early morning, the Jahncke tug CLARIBEL, with tow, was in collision with the Causeway of The Greater New Orleans Expressway. The Causeway is a 24-mile-long concrete bridge spanning the center of Lake Pontchartrain at New Orleans. On the date referred to, the tug CLARIBEL received written orders from Jahncke's administrative assistant to its marine superintendent, to-wit: "WEATHER PERMITTING. Take one big TJ barge to Dredge Maurepas to be loaded with reef (oyster shell). Pick up two loads of reef (Alabama and Florida) and take to Slip No. 4. You are to be available at Slip No. 4 no later than 1 PM Tuesday (January 26)." Accordingly, the empty barge TJ-55 was push-towed by

the CLARIBEL from Jahncke Slip No. 4 at 11:15 p.m., headed north through the Industrial Canal at New Orleans, which connects with Lake Pontchartrain, on its way to the dredge MAUREPAS located near the north shore of Lake Pontchartrain via the north drawbridge of the Causeway, a distance of about 20 miles.

The CLARIBEL apparently encountered no fog when it left the mouth of the Canal and entered the Lake, although there was a slight haze over the water at the time. Captain John Carver, master of the CLARIBEL, set a course of 355° and at midnight was relieved by the pilot, D. C. Brister.

The captain instructed the pilot to stop the vessel if he ran into fog and to call the captain who would assist him in dropping anchor. Weather conditions remained the same until 1:10 a.m., at which time a dense fog was encountered which limited visibility to less than 200 feet. The pilot, Brister, did not stop but reduced speed from 7 m.p.h. full ahead to about 4 m.p.h. About five minutes after reducing speed, the CLARIBEL and its tow rammed a support piling on the Causeway Bridge at a point 12.6 miles from the south shore and 3.4 miles from the north drawbridge, doing extensive damage to it. A truck owned by the claimant, Winn-Dixie, and driven by Bradford Coleman, was damaged and lost some of its freight when two spans of the Causeway collapsed under it as a result of the collision. Coleman claims he was injured at the time. The pilot did not see the Causeway until he struck it.

Petitioner concedes at the outset that it is not entitled to exoneration from liability. It avers that the accident was caused through the sole fault of its pilot, Brister, who continued to navigate in heavy fog despite company policy that he stop when such conditions were encountered.

The first question we must determine is whether the CLARIBEL was unseaworthy. More specifically, was the CLARIBEL unseaworthy because of compass error and was her crew incompetent?

The CLARIBEL's magnetic compass was purchased and installed in 1956. The evidence indicates that it has never since been checked or calibrated, though Jahncke's Marine Superintendent Nunez contends it was checked once. Nunez testified (by deposition because of serious illness) that the CLARIBEL's compass had been repaired in June or July 1959, about six months before the accident; that this was the only time it was ever checked. He said he would produce an invoice showing the repair, but apparently it was never found and it is not in evidence. This testimony has no corroboration in the record and is vague and indefinite so that we place little reliance upon it. Captain Carver testified, as did Brister, his pilot, that Nunez told them after the accident that the compass had an error of 17° west. Nunez, however, denied their statements to this effect. Carver and Brister contradicted him, saying they were told about the error *after* the accident. Repairs and maintenance have been performed on many parts of the vessel from time to time, all of which have an effect on compass heading, but the compass was not properly checked. There was no regular maintenance

practice for upkeep of the vessel or its equipment. Arc welding, which also has a definite effect on the compass of a steel-hulled vessel, had been performed on the tug shortly before the accident but the compass was not checked when the welding was completed. Barges in tow of the tug also can affect the compass. The evidence with regard to extent of error in the compass is not entirely clear and is, therefore, in dispute. Petitioner claims the error was 11° west. Petitioner avers that compass error was immaterial; that the CLARIBEL always made the run on a compass heading of 355°. It states that on subsequent runs 355° was found to be the correct course. Captain Carver testified that after the accident he traveled a 358° course in order to reach the north draw of the Causeway. It is impossible to reconcile these conflicts. Reference to the charts of Lake Pontchartrain in evidence proves beyond doubt that 355° either true or magnetic course is not the proper course to the north draw of the Causeway. The correct course is 342 1/2° true, and 336 1/2° magnetic, and is the heading of a properly calibrated compass on a vessel heading into the Lake through the Industrial Canal, the Canal being in alignment with the north draw of the Causeway.

In our opinion the faulty compass was undoubtedly a primary cause of the collision, without which the accident would not have happened.

The captain and pilot of the CLARIBEL testified they did not know the compass was in error prior to the accident. They said that even had they known of the error they did not then or now know how to correct or com-

pensate for deviation. These men were responsible for the navigation of this vessel and tow and though they had worked on Lake Pontchartrain for several years, they were completely lacking in ability to use a compass properly. They had never been instructed in the use of the compass; also they were not licensed by the Coast Guard.

On this trip the vessel was short one crew member. There were six men aboard; one of them the captain considered a "green" deckhand. Though in weather of the kind encountered it is necessary that a lookout be posted at the head of the flotilla, none was provided.

To run blind in a dense fog is culpable negligence. Here the pilot was attempting to steer his vessel with a compass which is in error, though he did not then know it, and with no lookout posted to give warning of impending danger.

Petitioner in limitation, Jahncke, contends that the accident would have occurred no matter what course the pilot followed because they state that the cause of the accident was Brister's failure to stop the vessel when visibility was reduced, despite his instructions and company policy that he do so. It is true that failure to stop was a contributing factor to this accident, but the casualty resulted from a combination of causes which we have detailed. Compare *Mid-West Towing Co., Inc. v. Anderson*, 7 Cir., 1963, 317 F. 2d 270. Had the compass been true or had the captain or the pilot been instructed and capable of correcting for error, the accident would not have occurred.

When the CLARIBEL struck the Causeway it was off course 3.4 miles south of the north draw, the point at which it was to cross the Causeway. The most reasonable explanation for such a difference in course was compass error together with lack of knowledge of the crew and inability to correct for deviation, which were proximate causes of the accident. Of course, as we have pointed out before, neither the captain nor the pilot knew of the compass error before the accident. On the north draw the foghorn was in operation and both bridge lights were functioning. The CLARIBEL with this particular tow could have been stopped within 400 feet. Even without a lookout at the head of the tow the foghorn should have given ample warning if the crew had been alert.

We must next decide whether there was privity or knowledge of Jahncke sufficient to warrant denial of the limitation petition. Limitation of liability is provided for in Title 46, Section 183(a), U.S.C.A. "The liability of the owner of any vessel, * * * for any loss, damage, or injury by collision, or for any act, matter, or thing, loss, damage or forfeiture, done, occasioned, or incurred, without the privity or knowledge of such owner or owners, shall not * * * exceed the amount or value of the interest of such owner in such vessel, and her freight then pending." In order for Jahncke to avail itself of this statutory provision it must affirmatively show that the acts of negligence set forth in detail above were done without its privity or knowledge. This turns on the facts of each particular case. *Coryell v. Phipps*, 317 U. S. 406, 63 S. Ct. 291 (1943).

Privity means personal cognizance or participation in the fault or negligence which causes the loss. *Continental Ins. Co. v. Sabine Towing Co.*, 5 Cir., 1941, 117 F. 2d 694, certiorari denied *Sabine Towing Co. v. Continental Ins. Co.*, 313 U. S. 588, 61 S. Ct. 1111 (1941). The term "knowledge," as used in the statute, has been held to mean not only personal cognizance but also the means of knowledge of which a party must avail himself in order to prevent a condition likely to produce or contribute to a loss. *The Cleveco*, 6 Cir., 1946, 154 F. 2d 605.

The marine superintendent for Jahncke was responsible for the maintenance and upkeep of petitioner's vessels and for the hiring and firing of marine personnel. It is well settled that a corporation is chargeable with privity or knowledge which will defeat limitation of liability when its knowledge is that of one of the managing officers. *The Princess Sophia*, 9 Cir., 1932, 61 F. 2d 339, certiorari denied 288 U. S. 604, 53 S. Ct. 396; *In Re Petition of Henry DuBois Sons Co.*, S.D.N.Y., 1960, 189 F. Supp. 400. A marine superintendent is a managing officer whose privity or knowledge is chargeable to the corporation. *The Erie Lighter*, D. C., N. J., 1918, 250 F. 490.

The CLARIBEL's compass was installed in 1956 and until the time of the accident we believe it had never been properly checked. Nunez, the marine superintendent, knew when the compass was installed, about the numerous repairs to the tug and also knew that electric welding had been performed on the vessel. Nevertheless we hold that he failed to have the compass checked from time to time. Checking it for error and calibration would have been a

simple task. Vessels navigating in Lake Pontchartrain and the other inland waterways in this area should not be expected to travel without the benefit of a properly calibrated compass even though none is required by specific law. Such vessels operate in wind, rain and fog, day and night. Failure to have a properly working compass on this vessel was negligence and is, therefore, attributable to petitioner in limitation.

The captain and the pilot were not competent to operate with a compass which was in error and make appropriate correction for deviation. These men were not licensed by the Coast Guard, and although a license is not required of inland tug operators, a heavier burden rests on the owner when he is attempting to show that he hired competent personnel. *The Ruth Conway*, D. C. Md., 1947, 75 F. Supp. 514. Had Carver and Brister been licensed, Jahncke could have relied on this fact. But in the absence of licenses Jahncke should have made some inquiry into the qualifications and abilities of its employees to handle their respective duties. Petitioner has not shown that it has ever made any inquiries into the qualifications of its employees—the proof is to the contrary.

Nunez, the marine superintendent, did not check into the competence of men he hired, and no instructions were given the crew about use of a compass. Jahncke failed to provide an adequate and competent crew as was its duty as a shipowner. *Admiral Towing Co. v. Woolen*, 9 Cir., 1961, 290 F. 2d 641. Therefore, Jahncke is chargeable with the knowledge of the incompetence of its crew.

Lake Pontchartrain is known to be subject to varied and often severe weather changes, with considerable night fog during the winter. Jahncke relies on the 10:00 p.m. general weather forecast of the United States Weather Bureau for the Middle Gulf, which made no mention of fog. The tug owner has a duty, however, to send the vessel out prepared to meet conditions which are likely to befall the vessel. It is the owner's duty to see to it that a vessel's equipment is in safe working order. *In Re Jacobson*, D. C. Tex., 1931, 52 F. 2d 179. We hold that it failed to do so.

Petitioner contends that it is entitled to limitation because the accident was due to disregard by Brister, its pilot, of company's orders in failing to stop when visibility became limited to less than a half mile. However, this accident was not the result of a sudden and unexpected emergency but occurred for numerous reasons we have set forth which could have been ascertained by Jahncke's marine superintendent before the accident had he exercised due diligence. The negligence which caused this accident was, therefore, with the owner's privity or knowledge. *The Linseed King*, 258 U. S. 502, 52 S. Ct. 450 (1932). Petitioner has failed to establish affirmatively that it exercised due diligence to furnish a seaworthy vessel, properly equipped and competently manned. See *Lord v. Goodall S.S. Co.* (Cir. Ct., D. Calif., 1877), 15 Fed. Cas. 884 (Case No. 8506), affirmed 102 U. S. (12 Otto) 541.

The Home Insurance Company, which is joined as a co-defendant in the two direct actions here, seeks dismissal of these suits against it on the ground that the in-

surance coverage which it wrote in favor of Jahncke is an ocean marine policy which is excluded from the direct action provisions. They state that the Louisiana Direct Action Statute (La. R. S. 22:655), which authorizes direct suits against an insurer (now codified in the Louisiana Insurance Code 22:1-1459), is inapplicable to ocean marine insurance because such insurance is specifically excluded from the Code under the provisions of La. R. S. 22:611 which makes the Code applicable "to insurances other than ocean marine and foreign trade insurances."

The defendant insurer contends that its policy here is one of hull insurance and is known as ocean marine insurance. Two insurance agents testified in support of this view. However, by whatever name the present policy is called, whether hull insurance or marine protection and indemnity insurance, there is no doubt that The Home Insurance Company undertook to insure Jahncke against liability for damage to or destruction of another's property as a result of collision by the insured tug. The policy so states in unmistakable, clear language. This being true, the policy issued by Home insofar as it undertakes to insure against the liability of Jahncke for damage to or destruction of another person's property is liability insurance as defined by the Louisiana Insurance Code, La. R. S. 22:6(4). *Maryland Casualty Co. v. Cushing*, 347 U. S. 409 (1954), upheld the right of a party to prosecute a direct action against the insurers of a vessel where the policy in that instance was a marine protection and indemnity policy. Judge Wright, in his opinion in *Cushing*, 99 F. Supp. 681, 684, pointed out that there was no real distinction to be made between hull insurance and marine

protection and indemnity insurance. We look to the policy here and find that though it is a hull policy, it combines hull insurance with a collision liability clause. This is, therefore, for purposes of this suit, definitely a public liability policy and direct actions against the insurer are proper. Compare *Reid v. Crain Bros.* (La. 3 Cir., 1961), 134 So. 2d 917; *Lovless v. Employers' Liability Assurance Corporation*, 5 Cir., 1955, 218 F. 2d 714.

We have also concluded to grant the motion to dismiss and for summary judgment filed by defendant, The Home Insurance Company, to the claim of Bradford Coleman in the limitation proceeding which was not filed until April 1, 1963, the first day of the trial of this case on the merits.

The dates of numerous occurrences in this litigation are important to justify our dismissal of the Coleman action. On February 3, 1960, Jahncke filed its petition for limitation growing out of the accident on January 27, 1960. On February 5, 1960, an injunction was issued restraining the commencement of any and all suits, actions or legal proceedings except in the limitation proceeding, against petitioner or its insurers, pending final determination of the proceeding. On April 7, 1960, the court entered an order noting the default of all persons who had not filed claims and barring such persons from filing claims in the limitation proceeding.

On July 13, 1960 and January 18, 1961, this court relaxed its injunction and permitted filing of a direct action by Winn-Dixie Louisiana, Inc. against The Home Insurance Company.

On February 7, 1962, more than two years after the accident, pursuant to a motion of Bradford Coleman, the court again relaxed its injunction to permit Coleman to file a direct action against The Home Insurance Company.

No such action was ever filed. Now, more than three years after the accident, Coleman has attempted to file a claim in the limitation proceeding. No excuse for the delay has been offered to the court.

Tort actions in Louisiana are barred by the prescription of one year, i.e. one year from the date of the injury (LSA-Civil Code, Articles 3536 and 3537). There is no doubt that defendant has been seriously prejudiced by the laches of claimant. Accordingly, the motion to dismiss and for summary judgment on these grounds is, therefore, granted.

We hold, therefore, that the petition for limitation should be denied and that an interlocutory decree on the issue of liability be entered in favor of The Greater New Orleans Expressway Commission, maintaining its claim against Jahncke Service, Inc. and The Home Insurance Company, and in favor of Winn-Dixie Louisiana, Inc., maintaining its claim against The Home Insurance Company. The claim of Bradford Coleman in the limitation proceeding is dismissed.

Decree will be entered accordingly.

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Supreme Court of the United States

OCTOBER TERM, 1965

No. 637

JAHNCKE SERVICE, INC.
and
THE HOME INSURANCE COMPANY,
Petitioners,

versus

THE GREATER NEW ORLEANS
EXPRESSWAY COMMISSION
and
WINN-DIXIE LOUISIANA, INC.,
Respondents.

BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

GEORGE B. MATTHEWS
CHARLES E. LUGENBUHL
N. B. BARKLEY, JR.
WILLIAM McM. KING
Attorneys for Respondent,
The Greater New Orleans
Expressway Commission

LEMLE & KELLEHER
LANCASTER & KING
Of Counsel

TABLE OF AUTHORITIES

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JAHNCKE SERVICE, INC.
and
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and
WINN-DIXIE LOUISIANA, INC.,
Respondents.

BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

Under the guise of "questions . . . of national importance" and alleged inter-circuit conflict, petitioners here seek to have this Court reconsider its holding in *Maryland Casualty Co. vs. Cushing*, 347 U.S. 409 (1954), when, because of the District Court's denial of limitation, the questions and issues of *Cushing* are not present; and to overturn the amply supported fact findings of the District Court in violation of the McAllister Rule.[1]

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[1] "In reviewing a judgment of a trial court, sitting without a jury in admiralty, the Court of Appeals may not set aside the judgment below unless it is clearly erroneous. No greater scope of review is exercised by the appellate tribunals in admiralty cases than they exercise under Rule 52 (a) of the Federal Rules of Civil Procedure, 28 U.S.C.A." *McAllister vs. United States* (1954) 348 U.S. 19.

The simple answer to the first questions presented by petitioners lies in the fact that the District Court here, after a full trial on the merits, *denied* petitioner, Jahncke Service, Inc., the right to limit its liability under the Federal Act. At this juncture, and without the benefit of limitation, Jahncke Service, Inc. and its underwriter stood in the same position as any ordinary respondent in a simple action in maritime tort. Accordingly, it cannot seriously be argued that the District Court's action in permitting a direct action against Jahncke's underwriter was "violative of the Federal Limitation of Liability Act." Neither the Act nor *Cushing* and its issues were before the Court and, insofar as this Court is concerned, such issues " . . . ought not to be anticipated in the theoretical abstract."[2]

Petitioners suggest to this Court that the time is right to clarify *Cushing* and that "definitive clarification of the questions at issue" was frustrated when, after this Court granted certiorari for the second time in *Cushing*, 364 U.S. 878, the case was settled. Petitioners have omitted to mention, however, that, following a full trial on the merits and an appeal to the United States Court of Appeals for the Fifth Circuit, limitation was *granted*. With limitation denied in the case at bar, however, *Cushing* was moot and the only question to be answered was whether the Louisiana Direct Action Statute[3] was applicable to a policy of ocean marine insurance containing a collision liability clause. This question was answered in the affirmative and is in conformity with sound existing precedent, both Federal, *Cushing vs. Maryland Casualty Co.*, (5 Cir.,

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[2]*Tokio Marine & Fire Ins. Co. vs. Aetna Cas. & Surety Co.*, (5 Cir., 1963) 322 F. 2d 113.

[3]Louisiana Revised Statutes, Title 22 §655.

1952) 198 F. 2d 536; *Lovless vs. Employers Liability Assurance Corporation* (5 Cir., 1955) 216 F. 2d 714; *Tokio Marine and Fire Ins. Co. vs. Aetna Cas. & Surety Co.* (5 Cir., 1963) 322 F. 2d 113; and State, *Reid vs. Crain Brothers* (La. App., 1961) 134 So. 2d 917.

Turning next to the second question posed by petitioners, it is clear that the decision of the United States Court of Appeal for the Fifth Circuit is in no way in conflict with the decisions of other circuits, particularly the decisions of the Second Circuit referred to by petitioners. It is submitted that the United States Court of Appeals for the Fifth Circuit has done nothing more in the instant case than to apply well established principles of maritime law relative to the requirements of seaworthiness to the facts as determined by the District Court. The cases alleged to be in conflict with the decision of the Appellate Court here hold nothing more than that the obligation of seaworthiness requires "reasonable fitness' and does not obligate a shipowner to furnish an "accident-free" vessel. "Reasonable fitness", however, is a relative matter depending upon the facts and circumstances of each case. On the facts presented in the case at bar, it has been determined that the CLARIBEL was not reasonably fit for her intended service.

As pointed out in the case of *Walker vs. Harris* (5 Cir., 1964) 335 F. 2d 185, cert. den. 379 U.S. 930:

> Seaworthiness, as that term has been defined and redefined, is reasonable fitness to perform or do the work at hand. *Saunders vs. Pool Shipping Co.*, 5 Cir., 1956, 235 F. 2d 729, 1956 AMC 1351; *Ionion Steamship Co. vs. United Distillers of America, Inc.*, 5 Cir., 1956, 236

> F. 2d 78, 1956 AMC 1750; *Tropical Marine Products vs. Birmingham Fire Ins. Co.*, 5 Cir., 1957, 247 F. 2d 116, 1957 AMC 1946; *Vega vs. The Malula*, 5 Cir., 1961, 291 F. 2d 415, 1961 AMC 1698; *Delta Eng'r vs. Scott*, 5 Cir., 1963, 322 F. 2d 11; *Texas Menhaden Co. vs. Johnson*, 5 Cir., 1964, ... F. 2d . . . . , ... , nn. 1, 2 [No. 20713, May 13, 1964]. The subsidiary questions leading to ultimate conclusion of seaworthiness are therefore: what is the vessel to do? What are the hazards, the perils, the forces likely to be incurred? Is the vessel or the particular fitting under scrutiny, sufficient to withstand those anticipated forces?"

All of these questions were answered by the evidence elicited at the trial and, it was determined, under the existing facts and circumstances, that the CLARIBEL, due to deficiencies in equipment and crew, was not reasonably fit for the service in which she was engaged; was, therefore, unseaworthy and the owners privy to such unseaworthiness. Petitioners have utterly failed to show that such factual determinations were "clearly erroneous."[4] With respect to the facts and circumstances found to exist in the case and which bore on propriety of the CLARIBEL's equipment and the competency of her crew, and, therefore, on the issue of her seaworthiness, the Appellate Court pointed out that:

> "Lake Pontchartrain is large and shallow, subject to sudden weather changes, treacherous squalls, and frequent fog. Commercial traffic

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[4] *McAllister vs. United States*, supra.
The Court of Appeals here even commented that:
"The evidence generously supports the district court's finding that shortcomings of crew and compass were a proximate cause of the accident, though not the sole proximate cause."

> is heavy, and the barges that ply the lake are big and unwieldy. Petitioner's own compass expert, Mr. Irwin Williams, testified that anyone who navigates on Lake Pontchartrain should have a 'proper compass' and should understand how to use it. Libellants' expert, Captain E. R. Vorenkamp, said that, in his opinion, people operating tugs on the lake should have more or less the qualifications required of offshore navigators, and should certainly know how to check a compass for changes in deviation. In light of this testimony, we cannot say that the district court's finding of unseaworthiness is unwarranted, despite the laxity of prevailing custom on Lake Pontchartrain. Usage is not, and should not be, an inevitable standard." 341 F. 2d 956, 959.

Accordingly, no extraordinary test of seaworthiness has been announced or applied in the decision of the Court of Appeals for the Fifth Circuit, nor in the other decisions of that Court cited by petitioners. Its decisions are clearly in conformity with those of other circuits and properly state well established principles of maritime law.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that there is no justification for the issuance of a *writ of certiorari* in this case and that the petition therefor should be denied.

GEORGE B. MATTHEWS
CHARLES E. LUGENBUHL
N. B. BARKLEY, JR.
WILLIAM McM. KING
Attorneys for Respondent,
The Greater New Orleans
Expressway Commission

Of Counsel:

LEMLE & KELLEHER
LANCASTER & KING
Of Counsel:
October, 1965

CERTIFICATE OF SERVICE

I, George B. Matthews, having been admitted to practice before this Honorable Court on the 18th day of April, 1960, do hereby certify that copies of the above and foregoing brief in opposition to the petition for certiorari have been served upon the petitioners by mailing the same to Eberhard P. Deutsch, Esq., c/o Deutsch, Kerrigan & Stiles, Attorneys at Law, Hibernia Bank Building, 812 Gravier Street, New Orleans, Louisiana, 70112, first class, postage prepaid, at New Orleans, Louisiana, this day of the month of , 1965.

George B. Matthews
1836 National Bank of
Commerce Building
New Orleans, Louisiana

Office-Supreme Court, U.S.
FILED
DEC 27 1965
JOHN F. DAVIS, CLERK

SUPREME COURT OF THE UNITED STATES

October Term, 1965

No. 637

JAHNCKE SERVICE, INC.
and
THE HOME INSURANCE COMPANY,
Petitioners

versus

THE GREATER NEW ORLEANS EXPRESSWAY COMMISSION
and
WINN-DIXIE LOUISIANA, INC.,
Respondents

MOTION TO WITHDRAW AS PETITIONER

Petitioner The Home Insurance Company moves that it be permitted to withdraw as a petitioner for certiorari herein, and that the petition for certiorari be dismissed as to it, without prejudice to maintenance of the petition in behalf of mover's co-petitioner, Jahncke Service, Inc.

Eberhard P. Deutsch,
Hibernia Bank Building,
New Orleans 70112,
Attorney for Petitioners

I, Eberhard P. Deutsch, attorney for petitioners and a member of the Bar of the Supreme Court of the United States, certify that on December , 1965, I served copies of the foregoing motion on respondents by mailing the same in duly addressed envelopes, with first-class postage prepaid, to their respective attorneys of record: George B. Matthews, Esq., National Bank of Commerce Building, New Orleans 70112, attorney for The Greater New Orleans Expressway Commission, and Donald L. King, Esq., 225 Baronne Street, New Orleans 70112, attorney for Winn-Dixie Louisiana, Inc.

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